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No. 14-7955

In the Supreme Court of the United States

RICHARD E. GLOSSIP, ET AL.,
Petitioners,
v.
KEVIN J. GROSS, ET AL.,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit

BRIEF FOR ALABAMA, ARIZONA, ARKANSAS, COLORADO, CONNECTICUT, GEORGIA, IDAHO, LOUISIANA, NEVADA, TENNESSEE, TEXAS, UTAH, & WYOMING AS AMICI CURIAE SUPPORTING RESPONDENTS

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QUESTIONS PRESENTED

1. Does a three-drug lethal injection protocol create a substantial risk of severe pain in violation of the Eighth Amendment when the first drug is highly likely to render the offender unconscious and insensate during the remainder of the execution procedure?

2. Does the *Baze*-plurality stay standard apply when states are not using a protocol substantially similar to the one that this Court considered in *Baze*?

3. When bringing an Eighth Amendment challenge to a method of execution under 42 U.S.C. § 1983, must a claimant establish the availability of an alternative method of execution?

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INTEREST OF AMICI CURIAE

A majority of states, as well as the federal government, impose capital punishment as a sentence for the worst murders.[1] *See Baze v. Rees*, 553 U.S. 35, 47 (2008) (plurality opinion); *Gregg v. Georgia*, 428 U.S. 153, 177 (1976) (plurality opinion). The *amici* states have an interest in executing offenders sentenced to this punishment through means that are humane, effective, and available.[2]

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[1] Ala. Code §§ 13A-5-39(1), 13A-5-40; Ariz. Rev. Stat. Ann. § 13-751; Ark. Code Ann. § 5-4-615; Cal. Penal Code §§ 190, 190.2; Colo. Rev. Stat. § 18-1.3-1201; Conn. Gen. Stat. § 53a-46a; Del. Code Ann. tit. 11, § 4209; Fla. Stat. Ann. § 921.141; Ga. Code Ann. § 16-5-1; Idaho Code Ann. § 19-2515; Ind. Code § 35-50-2-3; Kan. Stat. Ann. § 21-6617; Ky. Rev. Stat. Ann. § 532.030; La. Code Crim. Proc. Ann. art. 905; Miss. Code Ann. § 97-3-21(3); Mo. Rev. Stat. § 565.020; Mont. Code Ann. §45-5-102; Neb. Rev. Stat. §§ 28-303, 29-2519–2524; Nev. Rev. Stat. § 200.030; N.H. Rev. Stat. § 630:1; N.C. Gen. Stat. Ann. § 15A-2000; Ohio Rev. Code Ann. § 2929.04; Okla. Stat. Ann. tit. 21, § 701.9; Or. Rev. Stat. § 163.105; 18 Pa. Const. Stat. Ann. § 1102(a)(1); S.C. Code Ann. § 16-3-20; S.D. Codified Laws § 23A-27A-4; Tenn. Code Ann. § 39-13-204; Tex. Penal Code Ann. § 12.31; Utah Code Ann. § 76-3-206; Va. Code Ann. § 18.2-10(a); Wash. Rev. Code Ann. § 10.95.030; Wyo. Stat. Ann. § 6-2-101; 18 U.S.C. § 3591. *See also* Vt. Stat. Ann. tit. 13, § 3401 (making treason punishable by death).

[2] The *amici* States do not need consent of the parties to file this brief. *See* Sup. Ct. R. 37(4).

SUMMARY OF THE ARGUMENT

Extensive litigation over every element of lethal injection protocols has frustrated, delayed, or halted executions throughout the United States. The *amici* states urge this Court to adopt Justices Thomas and Scalia's view of the Eighth Amendment and hold that it prohibits only punishments deliberately designed to inflict pain. At the very least, the *amici* states urge this Court to enforce the *Baze* plurality's standard for all challenges to execution methods, allowing states to carry out constitutional capital sentences without being mired in interminable litigation. The only sensible and effective way to resolve this litigation is to *strictly* require plaintiffs to present an acceptable, available alternative to the state's protocol, and to hold plaintiffs to their proposed remedy. That requirement is the only thing that will prevent suits under 42 U.S.C. § 1983 from being anything other than habeas claims in disguise.

The states have adopted lethal injection protocols that, as a first step, render the offender unconscious. Many states began using sodium thiopental for this purpose, and later pentobarbital. But when the political opponents of capital punishment successfully pressured drug manufacturers to make those drugs unavailable, states looked to other, equally effective alternatives. This search led some states to midazolam: a drug that causes unconsciousness and prevents an offender from experiencing pain during an execution. And midazolam has done just that in twelve executions, under the same three-drug protocol Oklahoma uses.

For their part, death row inmates have sued about nearly every aspect of lethal injection, no matter what drugs were involved. This litigation should surprise no one; these lawsuits, although proceeding under § 1983, are thinly veiled attempts to prevent an offender's execution by *any* method. By filing § 1983 lawsuits without proposing any feasible alternative method of execution, inmates have turned the "courts into boards of inquiry charged with determining 'best practices' for executions, with each ruling supplanted by another round of litigation touting a new and improved methodology." *Baze*, 553 U.S. at 51.

ARGUMENT

I. The Court should uphold the constitutionality of Oklahoma's three-drug protocol.

Inmate challenges to execution methods have ground executions to a halt in many states. The *amici* states urge this Court to close the litigation floodgates and affirm the constitutionality of Oklahoma's three-drug protocol. It should do so in one of two ways.

First, the Court should explicitly adopt the standard Justices Thomas and Scalia proposed in *Baze*: "a method of execution violates the Eighth Amendment only if it is deliberately designed to inflict pain." *Id.* at 94 (Thomas, J., concurring). None of the states use a method of execution that is

designed to torture offenders or inflict "pain for the sake of pain." *See id.* at 48 (plurality opinion). It is undisputed that Oklahoma's protocol is constitutional under this standard.

Second, and at the very least, the Court should strictly require offenders who are challenging a method of execution to propose a "feasible[and] readily implemented" alternative that alleviates "a substantial risk of severe pain." *Id.* at 52 (plurality opinion). The plurality opinion in *Baze* rightly recognized that plaintiffs in a § 1983 case must proffer an alternative execution method that is both effective and available to the particular state the offender has sued. Only at that point, "[i]f a state refuses to adopt such an alternative . without a legitimate penological justification for adhering to its current method of execution, then a state's refusal to change its method can be viewed as 'cruel and unusual' under the Eighth Amendment." *Id.* If an offender proposes no alternative, then there is nothing for a state to do and nothing for a court to evaluate. *See Gissendaner v. Comm'r, Ga. Dep't of Corr.*, 779 F.3d 1275, 1283 (11th Cir. 2015) (affirming dismissal for failure to state a claim because the offender failed to plead an alternative execution method). The proposed remedy in a § 1983 case cannot be "no execution." *See Hill v. McDonough*, 547 U.S. 573, 580–81 (2006).

Petitioners have never identified an alternative to midazolam that they would not also challenge. Although they have recently hinted that compounded pentobarbital is an available alternative, Br. of Petitioners at 47, they have refused to concede that

they would accept that protocol were it adopted. And, as explained below, a switch to compounded pentobarbital may not be a feasible alternative for all states and would not end these kinds of lawsuits in any event. *See, e.g.*, *Gissendaner*, 779 F.3d 1275 (challenging the use of compounded pentobarbital); *Arthur v. Thomas*, No. 11-438, Docs. 1 (Jun. 8, 2011) (challenging Alabama's substitution of pentobarbital for sodium thiopental) & 197 (Jan. 7, 2015) (amending complaint to challenge Alabama's substitution of midazolam for pentobarbital) (M.D. Ala.).

The Court should either follow Justice Thomas's opinion in *Baze* or strictly and explicitly require plaintiffs to propose a feasible alternative method of execution. The experience of the States underscores that, under either standard, the court of appeals should be affirmed.

II. States began to use midazolam because it is effective and other lethal injection chemicals became difficult to obtain.

States began to use midazolam because of a drug shortage, and it has been successfully used in a three-drug combination identical to Oklahoma's for at least 12 executions. When *Baze* was decided, nearly all states carrying out lethal injections used sodium thiopental. *Baze*, 553 U.S. at 53. Since then, states have experienced increasing practical difficulties in obtaining sodium thiopental and alternatives like pentobarbital. Even the petitioners

recognize these difficulties. Br. of Petitioners at 5–8. The states' use of midazolam as a successful alternative—along with the well-known history of the drug shortages caused by the anti-death-penalty lobby—greatly undermines Petitioners' claim.

A. Because of artificial shortages of other drugs, some states began to use midazolam.

Several years ago, states began to have difficulty acquiring sodium thiopental and pentobarbital. Most of this difficulty was due to an artificial shortage caused by anti-death-penalty activists. *See, e.g.*, *Chavez v. Fla. SP Warden*, 742 F.3d 1267, 1273–75 (11th Cir. 2014) (Carnes, C.J., concurring). Many of the chemicals that states need for lethal injection are manufactured in European countries or by European-owned companies, and the European Union prohibits the export of such chemicals for use in capital punishment. 2011 O.J. (L 338) 31, 34. *See also* 2000 O.J. (C 364) 9 (banning capital punishment in the European Union); 2005 O.J. (L 200) 5 (prohibiting the export of devices that could be used in capital punishment). Foreign pharmaceutical companies devised distribution procedures to prevent any sales to prisons. *See, e.g.*, Press Release, Lundbeck, *Lundbeck overhauls pentobarbital distribution program to restrict misuse* (Jul. 1, 2011) (Lundbeck, Danish maker of pentobarbital).[3] And, in

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[3] Available at http://investor.lundbeck.com/releasedetail.cfm?ReleaseID=605775 (last visited Mar. 5, 2015).

recent years, other pharmaceutical companies have ceased manufacturing these chemicals in the United States. *See, e.g.*, Nathan Koppel, *Drug Halt Hinders Executions in the U.S.*, The Wall Street Journal, Jan. 22, 2011 (Hospira, U.S. maker of sodium thiopental).[4]

In response to these shortages, Florida developed the drug combination now used by Oklahoma, which calls for 500 milligrams of midazolam hydrochloride, followed by 200 milligrams of vecuronium bromide, then 120 milliequivalents of potassium chloride. Florida Department of Corrections, *Execution by Lethal Injection Procedures: Specific Procedures* (9)(f).[5] Midazolam effectively causes unconsciousness, preventing offenders from feeling pain. *See, e.g.*, *Muhammad v. Florida*, 132 So. 3d 176, 188 (Fla. 2013). As explained in more detail below, Florida has used this three-drug protocol to execute 11 inmates. After watching Florida successfully execute inmates without incident, Alabama and other states that were unable to obtain barbiturates began using midazolam as well. *See, e.g.*, *Roberts v. Meyers*, No. 14-1028, 2015 WL 1198666 at *1 (M.D. Ala. Mar. 16, 2015).

As states made changes to their drug protocols, many states also updated their procedures to prevent administration errors and ensure that executions are effective and practically pain-free. States require

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[4] Available at http://www.wsj.com/articles/SB10001424052748704754304576095980790129692 (last visited Mar. 5, 2015).

[5] Available at http://www.dc.state.fl.us/oth/deathrow/lethal-injection-procedures-as-of_01-09-15.pdf (last visited Mar. 3, 2015).

specific experience for execution team members. Before an execution, team members undergo comprehensive training, including practicing every element of an execution, as well as simulations to prepare for problems that could occur. States follow extensive procedures for obtaining and checking drugs for use in executions and for monitoring offenders before their execution dates. During the execution procedure itself, states observe protections for the offender, such as specific consciousness checks following the administration of the sedative. *See, e.g.*, *Baze*, 553 U.S. at 55–56; Oklahoma Department of Public Safety, *The Execution of Clayton D. Lockett* 13–14, 26–29;[6] Br. of Respondents at 16–17; *Arthur v. Allen*, No. 07-0722-WS-M, 2007 WL 4105113, at *2 (S.D. Ala. Nov. 15, 2007). Although human error can arise in the execution process, state procedures and the drugs themselves are adequate to ensure there is no substantial risk of severe pain.

B. Midazolam has worked for 12 humane executions.

At least 12 offenders have been successfully executed with the challenged drug protocol Florida has used its protocol to execute 11 offenders without incident. *See* Florida Department of Corrections,

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[6] Available at http://www.dps.state.ok.us/Investigation/14-0189SI%20Summary.pdf (last visited Mar. 24 (2015).

Execution List.[7] And Oklahoma has executed one. According to eyewitness accounts, these executions took an average of 14 minutes. Although some offenders apparently moved slightly during their executions, reviewing courts have concluded that this is not evidence of consciousness or suffering. *See, e.g.*, *Muhammad*, 132 So. 3d at 188. These practically painless executions provide real-world evidence of midazolam's effectiveness as a sedative. And they stand in marked contrast to the brutal murders that justified them.

1. *William Happ (October 15, 2013).* William Happ kidnapped Angie Crowley, raped her, and strangled her with her own pants. *Happ v. State*, 922 So. 2d 182, 183–84 (Fla. 2005). His execution lasted 14 minutes, during which he allegedly blinked and yawned, but he was completely nonresponsive when an official "tugged at his eyelids and grasped his shoulder." Associated Press, *Fla. executes man for Illinois woman's 1986 murder*, Tampa Tribune, Oct. 15, 2013.[8]

2. *Darius Kimbrough (November 12, 2013).* Darius Kimbrough raped Denise Collins, breaking her skull and jaw during the attack. *Kimbrough v. State*, 886 So. 2d 965, 968–69 (Fla. 2004). His execution lasted 17 minutes, and he lay motionless the whole time. Susan Jacobson, *Darius Kimbrough,*

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[7] Available at http://www.dc.state.fl.us/oth/deathrow/execlist.html (last visited Mar. 3, 2015).

[8] Available at http://tbo.com/news/crime/happ-to-be-executed-today-for-1986-citrus-county-murder-20131015/ (last visited Mar. 11, 2015).

who killed Orange County woman, is executed, Orlando Sentinel, Nov. 12, 2013.[9]

3. *Thomas Knight (January 7, 2014).* Thomas Knight kidnapped Sydney and Lillian Gans, forced them to withdraw $50,000 at a bank, and shot each of them in the neck. *Knight v. State*, 923 So. 2d 387, 389 (Fla. 2005). While on death row for that crime, Knight stabbed corrections officer James Burke to death with a sharpened spoon. *Id.* at 389 n.1. His execution lasted 14 minutes; a reporter observed that he "seemed to drift into slumber." David Ovalle, *Thomas Knight, who killed Miami couple and a prison guard, executed*, Miami Herald, Jan. 7, 2014.[10]

4. *Juan Carlos Chavez (February 12, 2014).* Juan Carlos Chavez kidnapped and raped nine-year-old Jimmy Ryce, shot him in the back as he tried to escape, and later dismembered his body. *Chavez v. State*, 832 So. 2d 730, 736–41 (Fla. 2002). Chavez's execution lasted 15 minutes, during which time he may have "moved his feet." *See* Jay Weaver and David Ovalle, *Juan Carlos Chavez executed for murder of Jimmy Ryce*, Miami Herald, Feb. 12, 2014;[11] *Juan Carlos Chavez, Killer of Jimmy Ryce,*

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[9] Available at http://articles.orlandosentinel.com/2013-11-12/news/os-execution-darius-kimbrough-florida-20131112_1_darius-kimbrough-orange-county-woman-denise-collins (last visited Mar. 11, 2015).

[10] Available at http://www.miamiherald.com/news/local/community/miami-dade/article1959035.html (last visited Mar. 11, 2015).

[11] Available at http://www.miamiherald.com/news/state/article1960281.html (last visited Mar. 11, 2015).

Executed at Florida State Prison, NBCMiami, Feb. 13, 2014.[12]

5. *Paul Howell (February 26, 2014).* Paul Howell killed state trooper Jimmy Fulford with a pipe bomb while trying to deliver it to someone else. *Howell v. State*, 109 So. 3d 763, 765–66 (Fla. 2013). Howell's execution lasted 14 minutes, during which he may have opened his eyes. Jeff Burlew, *Howell apologizes to family before execution*, Tallahassee Democrat, Feb. 27, 2014.[13]

6. *Robert Henry (March 20, 2014).* Robert Henry beat Phyllis Harris and Janet Thermidor with a hammer and set them on fire while robbing a fabric store. *Henry v. State*, 134 So. 3d 938, 940 (Fla. 2014). His execution lasted 11 minutes, during which he may have blinked and moved his lips. *See* Brittany Wallman, *Broward killer apologizes, then speaks against death penalty before execution*, Sun Sentinel, Mar. 20, 2014;[14] Associated Press, *Fla. Man executed*

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[12] Available at http://www.nbcmiami.com/news/Execution-of-Juan-Carlos-Chavez-Killer-of-Jimmy-Ryce-Scheduled-for-Wednesday-245177101.html (last visited Mar. 11, 2015).

[13] Available at http://www.tallahassee.com/story/politics/2014/02/27/howell-apologizes-to-family-before-execution/5854789/ (last visited Mar. 11, 2015).

[14] Available at http://articles.sun-sentinel.com/2014-03-20/news/fl-robert-henry-execution-20140320_1_death-penalty-robert-lavern-henry-florida-state-prison (last visited Mar. 11, 2015).

for fatal beating, burning of two women, CBSNews.com, Mar. 21, 2014.[15]

7. *Robert Hendrix (April 23, 2014).* Robert Hendrix stabbed and shot Elmer and Michelle Scott to prevent Elmer from testifying in a burglary trial. *Hendrix v. State*, 136 So. 3d 1122, 1124 (Fla. 2014). His execution lasted 11 minutes and was uneventful. Jeff Schweers, *Many family members witness Hendrix's execution*, Ocala Star Banner, Apr. 23, 2014.[16]

8. *John Henry (June 18, 2014).* John Henry killed his wife, Suzanne, by stabbing her to death. He then kidnapped her son, Eugene Christian, stabbed him to death, and left his body in a field. *Henry v. State*, 948 So. 2d 609, 612 (Fla. 2006). Henry's execution lasted 11 minutes, during which he "softly" moved his lips before "clos[ing] his eyes and [becoming] motionless." Associated Press, *Florida man becomes 3rd executed in US in 24 hours*, CBSNews.com, Jun. 18, 2014.[17]

9. *Eddie Davis (July 10, 2014).* Eddie Davis kidnapped and raped an 11-year-old girl, Kimberly Ann Waters, suffocated her with plastic, and discarded her body in a trash can. *Davis v. State*, 875 So. 2d 359, 363 (Fla. 2003). Davis's execution lasted

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[15] Available at http://www.cbsnews.com/news/florida-man-executed-for-fatal-beating-burning-of-two-women/ (last visited Mar. 11, 2015).

[16] Available at http://www.ocala.com/article/20140423/ARTICLES/140429846?p=1&tc=pg (last visited Mar. 11, 2015).

[17] Available at http://www.cbsnews.com/news/florida-man-becomes-3rd-executed-in-us-in-24-hours/ (last visited Mar. 11, 2015).

11 minutes, and he "showed no signs of discomfort." Suzie Schottelkotte, *Eddie Wayne Davis Executed for Rape, Murder of 11-Year-Old Lakeland Girl*, The Ledger, Jul. 10, 2014.[18]

10. *Chadwick Banks (November 13, 2014).* Chadwick Banks shot his wife, Cassandra, and his ten-year-old stepdaughter, Melody Cooper. *Banks v. State*, 150 So. 3d 797, 798 (Fla. 2014). His execution lasted 17 minutes and was uneventful. Karl Etters, *Update: Banks executed for 1992 double murder*, Tallahassee Democrat, Nov. 14, 2014.[19]

11. *Johnny Kormondy (January 15, 2015).* Johnny Kormondy, along with others, repeatedly raped Cecelia McAdams and shot her husband, Gary McAdams, in the head. *Kormondy v. State*, 154 So. 3d 341, 343–44 (Fla. 2015). His execution lasted 11 minutes, during which his chest apparently "heaved" and "his jaw dropped." Arek Sarkissian, *Kormondy executed for 1993 killing*, Ocala Star Banner, Jan. 15, 2015.[20]

12. *Charles Warner (January 15, 2015).* Charles Warner raped and killed an 11-month old girl. *Warner v. State*, 144 P.3d 838, 856 (Okl. 2006). His execution lasted 18 minutes. Glenn Puit and Parker Perry, *Charles Warner executed in Oklahoma without*

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[18] Available at http://www.theledger.com/article/20140710/news/140719989 (last visited Mar. 11, 2015).

[19] Available at http://www.tallahassee.com/story/news/2014/11/12/familys-wait-justice-may-end-tonight/18926403/ (last visited Mar. 11, 2015).

[20] Available at http://www.ocala.com/article/20150115/ARTICLES/150119794 (last visited Mar. 17, 2015).

incident, McAlester News-Capital, Jan. 15, 2015.[21] Although he reportedly said, "It feels like acid," before the three-drug cocktail was administered, Warner did not suffer after the midazolam took effect. *Id.*

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Given this history, Petitioners cannot show that Oklahoma's protocol comes with a substantial risk of severe pain. Nor have they identified any readily available alternative to midazolam. In fact, midazolam itself may not even be available much longer. *See* Tracy Connor, *Drug-Maker Akorn Bans Sedative Midazolam for Executions*, Feb. 19, 2015.[22]

Of course, not every midazolam-based execution has been uneventful. But administration errors can occur regardless of the drug combination used. And such errors should lead to the adoption of additional safeguards and procedures, not the wholesale abandonment of successful drug protocols. *See* Oklahoma Department of Public Safety, *The Execution of Clayton D. Lockett*, supra at 8. The fact remains that midazolam is the one of the best drugs the states have available to render an inmate unconscious.

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[21] Available at http://www.mcalesternews.com/news/the-state-of-oklahoma-carried-out-the-execution-of-charles/article_b751aefc-9d27-11e4-a69b-b347f82c06c6.html (last visited Apr. 6, 2015).

[22] Available at http://www.nbcnews.com/storyline/lethal-injection/drug-maker-akorn-bans-sedative-midazolam-executions-n309191 (last visited Apr. 2, 2015).

III. No matter what states do, offenders challenge state execution methods as an additional way to postpone or halt lawful executions.

While facing drug shortages, states have been forced to defend against a host of litigation about their new procedures. As Justice Thomas predicted in *Baze*, death row inmates have used § 1983 to "embroil the States in never-ending litigation concerning the adequacy of their execution procedures." *Baze*, 553 U.S. at 105 (Thomas, J., concurring). In fact, just this February, Yale's Ethics Bureau admitted to this Court that the very reason for such lawsuits is delay. The Bureau explained that "[t]he very goal[] of the client's representation" in a challenge to an execution protocol is "preventing the client's execution." Brief for the Ethics Bureau at Yale as amicus curiae supporting Petitioner at 6, *Storey v. Lombardi*, No. 14-8362 (U.S. Feb. 9, 2015). The brief expressly confirms what the states have known—and told this Court—all along: "the principal goal of any lawyer representing a death row client is to prevent his client's execution." *Id.* at 7.

There is no execution method or drug protocol that the states can adopt to stanch the flood of litigation, unless this Court strictly requires plaintiffs to identify a readily available alternative to the state's method of execution. The states have consistently argued that these suits are really habeas petitions in disguise. *See Hill*, 547 U.S. at 581; Br. for Alabama, et al. as amici curiae in

Support of Respondents, *id.*, 2006 WL 927239; *Nelson v. Campbell*, 541 U.S. 637, 644–45 (2004); Br. for Ohio, et al. as amici curiae in Support of Respondents, *id.*, 2004 WL 553654. But even if these lawsuits could be construed as good faith litigation over execution best practices, a majority of this Court has recognized the inadvisability of courts sitting as boards of inquiry over execution procedures. *Baze v. Rees*, 553 U.S. at 51 (opinion of Roberts, C.J., joined by Kennedy, J., and Alito, J.), 69–71 (Alito, J., concurring), 105–06 (Thomas, J., concurring, joined by Scalia, J.). Alabama's experience shows courts are doing precisely that.

A. David Larry Nelson

Before this Court decided *Hill*, Alabama and 25 other states explained that "[i]n the real world, there is no meaningful distinction between [challenging an execution procedure and challenging an execution *per se*], and experience shows that an inmate can block an execution just as surely by challenging a 'procedure' as by challenging his sentence directly." Br. of Alabama, et al. in support of Respondents, *Hill*, 547 U.S. 573, 2006 WL 927239; *see also* Br. for the Ethics Bureau at Yale at 6-7, *Storey v. Lombardi*, No. 14-8362 (U.S. Feb. 9, 2015). Alabama presented a case study of this interminable litigation in David Larry Nelson. Br. for Alabama, et al. at *4-14, *Hill*, 547 U.S. 573, 2006 WL 927239. As the states predicted, his case dragged on after this Court decided *Hill*.

After convincing Wilson W. Thompson to have an "orgy" with him and his girlfriend, Linda Vice, Nelson shot and killed Thompson as Thompson began performing oral sex on Vice. Nelson then shot Vice and drove away in Thompson's car. *Nelson v. State*, 511 So. 2d 225, 229 (Ala. Crim. App. 1986). Once his post-conviction proceedings were over, Nelson challenged the state's proposed cut-down procedure that would enable it to access his veins and conduct a lethal injection. *Nelson*, 541 U.S. at 639. This Court permitted his § 1983 suit to go forward. *See id.*

On remand, when the state agreed to use the alternative procedure proposed by Nelson, Nelson's lawyers then challenged that alternative procedure on essentially the same grounds. *See* Br. of Alabama, et al. at *8-9, *Hill*, 2006 WL 927239. The district court permitted Nelson to file an amended complaint challenging the procedure he had supported in his first complaint and referred the case to a medical expert. *Nelson*, No. 03-1008, Docs. 60 (Apr. 22, 2005) & 83 (Jul. 28, 2006) (M.D. Ala.).

And Nelson's case remained pending long after that. The district court had yet to rule on the state defendants' May 2008 summary judgment motion when Nelson died in the prison infirmary of "natural causes" in November 2009, 27 years after his sentence was originally imposed. *Nelson v. Campbell*, No. 03-1008, Docs. 159 (May 15, 2008) & 174 (Dec. 3, 2009) (M.D. Ala.); Connie Baggett, *Death*

row inmate David Larry Nelson dies in Holman infirmary, Al.com, Nov. 3, 2009.[23]

B. Thomas Arthur

Thomas Arthur's litigation tactics similarly illustrate the states' experience. Arthur fatally shot Troy Wicker through the right eye, and his conviction and death sentence became final in 1998. *Arthur v. Thomas*, 739 F.3d 611, 618 (11th Cir. 2014). Arthur is well-known to state and federal courts in Alabama as a frequent filer of lawsuits, ranging from untimely post-conviction litigation to attempted fraud on the lower courts by orchestrating and filing a patently false affidavit from a fellow inmate. *See id.* at 612–27 (recounting the 30-year history of Arthur's criminal litigation); *Arthur v. State*, 820 So. 2d 886 (Ala. Crim. App. 2001); *Arthur v. Allen*, 452 F.3d 1234 (11th Cir. 2006), *cert. denied*, 549 U.S. 1338 (2007); *Arthur v. State*, 71 So. 3d 733 (Ala. Crim. App. 2010); *Arthur v. King*, 500 F.3d 1335, 1338-39 (11th Cir. 2007).

Both before and after this Court decided *Baze*, Arthur filed multiple § 1983 actions challenging various aspects of Alabama's execution protocols.

1. After his post-conviction appeals were over, Arthur challenged the constitutionality of Alabama's protocol, which at that time was composed of sodium pentothal, pancuronium bromide, and potassium chloride. *Arthur v. Allen*, No. 07-0342, 2007 WL

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[23] Available at http://blog.al.com/live/2009/11/death_row_inmate_david_larry_n.html (last visited Mar. 18, 2015).

2320069 at *1 (S.D. Ala. Aug. 10, 2007) (unreported). The district court dismissed Arthur's lawsuit, concluding that he unreasonably delayed filing it, and the Eleventh Circuit affirmed. *Arthur v. Allen*, 248 F App'x 128 (11th Cir. 2007), *cert. denied* 553 U.S. 1004 (2008).

2. Arthur immediately filed another § 1983 lawsuit, challenging Alabama's consciousness check and procedures administering lethal injections and again criticizing Alabama's use of sodium thiopental. *Arthur v. Allen*, No. 07-0722, Doc. 1 at 11–12, 16–17 (S.D. Ala. Oct. 9, 2007). Noting that Arthur's second § 1983 lawsuit was essentially identical to his first, the district court dismissed it. *Arthur v. Allen*, 2007 WL 4105113 at *1–2 (S.D. Ala. Nov. 15, 2007). The Eleventh Circuit affirmed, noting Arthur's delay and the suit's redundancy. *Arthur v. Ala. Dep't of Corr.*, 285 F. App'x 705 (11th Cir. 2008) (unpublished).

3. A few years later, Arthur filed yet another § 1983 suit, this time challenging Alabama's substitution of pentobarbital for sodium thiopental in its three-drug protocol. *Arthur v. Thomas*, No. 11-438, Doc. 1 (M.D. Ala. Jun. 8, 2011). The district court summarily dismissed his complaint, reasoning that it was time-barred and relying on Eleventh Circuit precedent holding that Alabama's adoption of pentobarbital was not a significant change to its protocol. *Arthur*, No. 11-438, Doc. 37 (M.D. Ala. Nov. 3, 2011). But the Eleventh Circuit reversed, remanding for further proceedings to determine whether the change in protocol was significant and whether Alabama would fail to administer a consciousness check. *Arthur v. Thomas*, 674 F.3d

1257 (11th Cir. 2012). On remand, the district court held an evidentiary hearing, the state renewed its motion for summary judgment, and the court denied that motion. *Arthur*, No. 11-438, Doc. 159 (M.D. Ala. Sept. 30, 2013).

4. While that action was still pending, pentobarbital became unavailable to Alabama, and Alabama substituted midazolam for pentobarbital in its execution protocol. Arthur amended his complaint, essentially substituting "midazolam" for "pentobarbital" in his arguments that the first drug in the state's protocol would not render him sufficiently unconscious. *Arthur*, No. 11-438, Doc. 197 (M.D. Ala. Jan. 7, 2015). The parties began further discovery, but the district court stayed that action pending the outcome of this Court's decision in this case. *Arthur*, No. 11-438, Doc. 241 at 3–4 (Mar. 18, 2015).

As one district court noted, Arthur is "picking every apple on the litigation tree, including some green and rotten ones." *Arthur*, No. 11-438, Doc. 195 at 5 n.2 (Jan. 1, 2015). And he is not the only death row inmate in Alabama's orchard. *See Grayson v. Sharp, et al.*, 2:12-cv-316-WKW; *Frazier v. Myers, et al.*, 2:13-cv-781-WKW; *Boyd v. Myers, et al.*, 2:14-cv-1017-WKW; *Roberts v. Myers, et al.*, 2:14-cv-1028-WKW; *Myers v. Myers, et al.*, 2:14-cv-1029-WKW; *Hunt v. Myers, et al.*, 2:14-cv-1030-WKW.

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The *amici* states have no interest in causing unnecessary pain during an execution. Far from

designing procedures to inflict pain, states choose the most humane and least painful methods possible to ensure a quick death. But when one method becomes unavailable, states must turn to another. The practical ability to carry out executions is "a legitimate penological justification" for using a particular execution method, including a three-drug protocol with midazolam. *Baze*, 553 U.S. at 52 (plurality opinion).

CONCLUSION

This Court should affirm the court of appeals.

Respectfully submitted,

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